

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SATISH SHAH, THE SATISH SHAH)
REVOCABLE TRUST, AMISH SHAH,)
DEBRA ANN SHAH, ROBERT E.)
THEROUX, DANIEL L. WILLIAMS)
and FREDERICK H. BACHMAN)

Plaintiffs,)

Case No. 3:06-CV-0712-RM

KIK INTERNATIONAL LLC,)
Defendant.)

COUNTER-DEFENDANTS' MOTION TO DISMISS AMENDED COUNTERCLAIMS

The Counter-defendants respectfully move to dismiss with prejudice Counts I, II, IV and V of the Amended Counterclaims filed by KIK International LLC ("KIK") on January 18, 2007 (Doc. # 42), and certain other allegations in Count III for failure to state a claim under FED. R. Civ. P. 9(b), 12(b)(6) and the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 ("PSLRA").

KIK is a sophisticated business entity. It entered into an option agreement to acquire APG for \$78 million. Following its own "intensive" due diligence, KIK negotiated at arms' length with the Sellers to effect a \$5 million reduction in the purchase price, exercised its option and acquired APG for \$73 million, less a still-to-be-determined post-closing adjustment. Now KIK apparently regrets some of the aspects of the SPA it negotiated with Sellers and wants a different deal, claiming it was defrauded. However, the majority of KIK's allegations are not based on misrepresentations or omissions that would constitute actionable fraud, despite having control of APG's financial records for a year. This is simply a contract dispute which should be resolved first through the net working capital adjustment arbitration and then before the AAA.

THEREFORE, for the reasons stated in their supporting *Brief*, the Counter-defendants respectfully request that the Court dismiss KIK's counterclaims with prejudice. Alternatively, the Counter-defendants request that this Court stay KIK's counterclaims pending resolution of the Net Working Capital Adjustment process for the reasons stated in the Sellers' *Consolidated Brief in Opposition to Defendant's Motion to Dismiss, and in Support of Cross Motions for Immediate Stay of the AAA Arbitration, for a Hearing to Determine Arbitral Forum, and to Compel Arbitration Before Ernst & Young*, filed on November 27, 2006 (Doc. # 20), and for all other appropriate relief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above *Motion To Dismiss* was served upon the following attorney of record by filing through the Northern District of Indiana's CM/ECF system on the 23rd day of February, 2007.

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